Bains Harding (Malaysia) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-24-97-95
RICHARD TALALLA J
4 SEPTEMBER 1995

Contract *— Guarantee — Performance bond — Bank guarantee to remain in force 60 days after date stated in certificate of final completion — Contract provided that defendant contractor could at its absolute discretion terminate contract with plaintiff subcontractor — Defendant terminated contract — Defendant demanded plaintiff to pay plaintiff's creditors failing which defendant would call on guarantee — Whether defendant had right to do so —Whether bank guarantee had ceased to have effect*

Civil Procedure *— Injunction — Interlocutory injunction — Defendant contractor could terminate contract with plaintiff subcontractor at its absolute discretion under contract — Defendant terminated contract — No fault of plaintiff — Defendant gave contract to another subcontractor in which defendant was shareholder — Defendant threatened to call on bank guarantee if plaintiff failed to pay plaintiff's creditors — Refusal of defendant to disclose details of new contract and subcontractors — Presumption that arose — Whether fraud on the part of defendant — Whether plaintiff should prove fraud beyond reasonable doubt — Whether to grant injunction to restrain defendant from calling on bank guarantee — Evidence Act 1950 s 114*

On 30 November 1992, the plaintiff entered into a contract ('the contract') with the second, third and fourth defendants whereunder the plaintiff was to carry out certain insulation and painting works as subcontractor to the defendants in respect of the defendants' contract with the main contractor. The services provided were highly specialized and there were only six contractors in the world, including the plaintiff and another Japanese company called Meisei Corporation, who were capable of undertaking such work. Pursuant to the contract, two performance bonds were provided by the plaintiff and issued by the first defendant ('the bank') in the form of guarantees. During the course of the plaintiff's work, several payments were made by the defendants to the plaintiff for the materials supplied. The payments were described as advances and were secured under an advance payment guarantee. Further payments were also made pursuant to the terms as set out under two supplementary agreements. The plaintiff continued to carry out the works under the contract until 14 April 1995, when the defendants terminated the contract pursuant to art 20 of the contract, which provided that the contractor had the right at any time, for any reason and at its absolute discretion to terminate the contract for convenience by notice in writing to the plaintiff. There was no allegation by the defendants that the plaintiff was in default in the performance of its work. After the termination of the contract, Meisei Corporation took over the plaintiff's work, and the defendants demanded the plaintiff to pay its creditors (the

lower-tier subcontractors), failing which the defendants would seek payments under the bank guarantees. The plaintiff contended that the defendants were not entitled to make such claims. The plaintiff argued that the defendants had conveniently terminated the contract, and gave it to Meisei Corporation with which the second defendants had a financial connection, and that the defendants called on the bank guarantees to pay off the lower tier subcontractors so that Meisei Corporation could continue to utilize the lower tier subcontractors' services to complete its work, at the expense of the plaintiff. The plaintiff further argued that it had met all its obligations to the defendants up to the date of termination and was entitled to payments under the contract. On the other hand, the defendants claimed that they had made substantial overpayments to the plaintiff. Pending trial of the issues in question, the plaintiff applied to the court for an interlocutory injunction restraining the defendants from accepting any money from the bank under the guarantees.

Held, allowing the application:

(1) Pursuant to art 9.3 of the contract, the bank guarantee was to remain in force and effect until 60 days after the date stated in the certificate of final completion. However, the defendants in this case had prematurely terminated the contract in accordance with art 20 of the contract. Thus, the event to final completion of the contract by the plaintiff was not to take place, and there could be no certificate of final completion. Accordingly, upon the act of the defendants rendering final completion impossible, the bank guarantee ceased to have force and effect (see p 441B–D)

(2) Even if the above was wrong, an examination of art 20 disclosed a number of obligations, none of which embraced the right of the defendants to make demand under the bank guarantees, or the liability of the defendants to submit to such demand and payment under the bank guarantees without objection. Nowhere in art 20 nor anywhere in the contract was there a right in the defendants to demand of the plaintiff that the plaintiff pay its debts to the lower tier subcontractors and/or in the event of the plaintiff failing to do so the defendants would be at liberty to make demand and receive payment under the bank guarantees. Therefore, payment by the defendants or the requirement by them of the plaintiff to make payment of the debts was gratuitous (see p 441E–I).

(3) In view of the defendants' refusal to tell the court whether one or more of the defendants had an interest in Meisei Corporation and to disclose the new contract with Meisei Corporation, the presumption under s 114 of the Evidence Act 1950 arose, and the supposition that the defendants had used art 20 as a device

to terminate the contract so as to enable Meisei to enjoy the benefit of whatever profits remained of the contract must be true. Accordingly, the defendants were guilty of fraud, and had acted in bad faith and in unconscionable manner. The plaintiff would therefore be entitled to the order for an interlocutory injunction (see pp 442I and 443A–G); *Bocotra Construction Pte Ltd & Ors v AG (No 2)* [1995] 2 SLR 733 and *Esso Petroleum Malaysia Inc v Kago Petroleum* [1995] 1 MLJ 149 followed.

(4) There were serious questions for trial in this case. Further, damages would not be an adequate remedy to the plaintiff because if the defendants were allowed to call on the bank guarantees and the bank made payment, the plaintiff might not be able to reimburse the bank, as it had been deprived of the profits it would have earned had the contract not been terminated. That would expose the plaintiff to being wound up The balance of convenience favoured the plaintiff (see pp 444C–I and 445A–D).

(5) In an interlocutory application for an injunction, a claim of fraud need not be proved beyond reasonable doubt. The plaintiff need only place sufficient affidavit evidence before the court to satisfy the court that a case of fraud or the likelihood of a fraud being committed had been established to an extent sufficient for the court to be minded to grant the injunction sought. The word 'fraud' itself need not to be mentioned (see p 443G–I); *Saminathan v Pappa* [1981] 1 MLJ 121 distinguished.

[Bahasa Malaysia summary:

Pada 30 November 199, plaintiff telah mengikat kontrak ('kontrak tersebut') dengan defendan-defendan kedua, ketiga dan keempat yang di bawahnya plaintif sepatutnya menjalankan beberapa kerja penebatan dan mengecat sebagai subkontraktor kepada defendan berkaitan kontrak defendan dengan kontraktor utama. Perkhidmatan yang diberikan adalah terlalu khusus dan terdapat hanya enam kontraktor dalam dunia ini, termasuk plaintif dan sebuah syarikat Jepun bernama Meisei Corporation, yang mampu membuat kerja tersebut. Di bawah kontrak tersebut, dua bon prestasi telah diberikan oleh plaintif, dan bon tersebut dikeluarkan oleh defendan pertama ('bank itu') dalam bentuk gerenti. Semasa kerja plaintif sedang dijalankan, beberapa bayaran telah dibuat oleh defendan. Pembayaran itu disifatkan sebagai pendahuluan dan dijamin di bawah gerenti bayaran pendahuluan. Bayaran-bayaran selanjutnya dibuat menurut terma-terma yang ditetapkan di bawah dua perjanjian tambahan. Plaintif meneruskan kerja-kerja mengikut kontrak sehingga 14 April 1995 apabila defendan-defendan menamatkan kontrak mengikut fasal 20 kontrak tersebut, yang memperuntukkan bahawa kontraktor mempunyai hak pada bila-bila masa, atas apa-apa sebab dan atas budi bicara mutlaknya untuk menamatkan kontrak demi kemudahan,

dengan memberi notis secara bertulis kepada plaintif. Tidak terdapat pengataan daripada pihak defendan bahawa plaintif ingkar dalam pelaksanaan kerjanya. Selepas penamatan kontrak itu, Meisei Corporation mengambil alih kerja plaintif dan defendan menuntut supaya plaintif membayar si piutangnya (subkontrakor tingkat bawah), dan jika dia gagal berbuat demikian, defendan-defendan akan menuntut bayaran di bawah gerenti bank tersebut. Plaintif mengatakan bahawa defendan tidak berhak membuat tuntutan sedemikian. Plaintif menghujah bahawa defendan telah menamatkan kontrak tersebut sesuka hati, dan telah memberikannya kepada Meisei Corporation yang defendan kedua mempunyai hubungan kewangan, dan bahawa defendan ingin menggunakan gerenti bank yang berkenaan untuk membayar subkontrakor tingkat bawah, supaya Meisei Corporation boleh terus menggunakan perkhidmatan subkontrakor tingkat bawah tersebut untuk menyelesaikan kerjanya, sehingga menjejaskan manfaat plaintif. Plaintif juga berhujah bahawa ia telah memenuhi kesemua kewajipannya kepada defendan sehingga tarikh penamatan, dan adalah berhak untuk pembayaran di bawah kontrak. Defendan pula menyatakan bahawa mereka telah membuat bayaran yang berlebihan kepada plaintif. Semasa menunggu pembicaraan isu-isu yang berkenaan, plaintif telah memohon kepada mahkamah untuk satu injuksi interlokutori untuk menyekat defendan daripada menerima apa-apa wang daripada bank di bawah gerenti tersebut.

Diputuskan, membenarkan permohonan:

(1) Menurut fasal 9.3, gerenti bank itu harus kekal berkuatkuasa sehingga 60 hari selepas tarikh yang dinyatakan dalam perakuan penyempurnaan muktamad. Defendan dalam kes ini telah menamatkan kontrak terlalu awal menurut fasal 20 kontrak tersebut. Maka, peristiwa yang membawa kepada penyempurnaan kontrak itu oleh plaintif tidak akan berlaku, dan perakuan penyempurnaan muktamad tidak mungkin wujud. Ekoran itu, atas tindakan defendan-defendan yang menjadikan penyempurnaan muktamad mustahil untuk berlaku, gerenti bank itu tidak lagi berkuatkuasa (lihat ms 441B–D).

(2) Jikapun perkara di atas salah, penelitian ke atas fasal 20 menunjukkan beberapa obligasi yang tiada satupun merangkumi hak defendan-defendan untuk membuat tuntutan di bawah gerenti bank atau liabiliti defendan untuk menurut tuntutan yang sedemikian dan membuat bayaran di bawah gerenti bank tanpa bantahan. Tidak terdapat dalam fasal 20 atau dalam mana-mana bahagian kontrak tersebut bahawa hak bagi defendan untuk menuntut daripada plaintif supaya plaintif membayar hutangnya kepada subkontraktor tingkat bawah, dan/atau sekiranya plaintif gagal berbuat demikian, defendan bebas untuk membuat tuntutan dan menerima bayaran di bawah gerenti bank. Maka, pembayaran

oleh defendan, atau kehendak mereka supaya plaintif membuat bayaran terhadap hutang itu adalah tidak patut (lihat ms 441E-I).

(3) Akibat keengganan defendan untuk memberitahu mahkamah sama ada seorang atau lebih daripada seorang daripada defendan mempunyai kepentingan dalam Meisei Corporation, dan mengemukakan kontrak baru dengan Meisei Corporation, anggapan bahawa defendan telah mempergunakan fasal 20 sebagai alat untuk menamatkan kontrak bagi membolehkan Meisei menikmati faedah daripada keuntungan yang masih tinggal dalam kontrak itu pasti benar. Oleh itu, defendan didapati bersalah kerana fraud, dan telah bertindak dengan niat jahat dan dengan cara yang tidak berhati perut. Maka, plaintif berhak mendapatkan perintah injuksi interlokutori (lihat ms 442I dan 443A–G); *Bocotra Contruction Pte Ltd & Ors v AG (No 2)* [1995] 2 SLR 722 dan *Esso Petroleum Malaysia Inc v Kago Petroleum* [1995] 1 MLJ 149 diikut.

(4) Terdapat soalan serius untuk perbicaraan dalam kes ini. Selanjutnya, ganti rugi tidak akan menjadi remedi yang memadai untuk plaintif kerana jika defendan dibenarkan untuk memanggil gerenti bank dan bank membuat bayaran, plaintif tidak mungkin dapat membayar ganti bank itu kerana ia telah dihalang daripada meraih keuntungan yang ia mungkin perolehi sekiranya kontrak tersebut tidak ditamatkan. Ini akan mendedahkan plaintif kepada penggulungan. Imbangan kesesuaian berpihak kepada plaintif (lihat ms 444C–I dan 445A–D).

(5) Dalam permohonan interlokutori untuk suatu injuksi, pendakwaan fraud tidak perlu dibukti sehingga melampaui keraguan munasabah. Plaintif hanya perlu mengemukakan keterangan afidavit yang mencukupi di hadapan mahkamah bagi meyakinkan mahkamah bahawa satu kes fraud atau berkemungkinan sesuatu fraud akan dilakukan telah dibuktikan ke tahap yang memadai bagi mahkamah untuk memberi injuksi yang dipohon. Perkataan 'fraud' sendiri tidak perlu dinyatakan (lihat ms 443G–I); *Saminathan v Pappa* [1981] 1 MLJ 121 dibeza.]

Notes

For cases on guarantees and performance bonds, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1628–1731.

For cases on injunctions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1425–1725.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504

Bocotra Construction Pte Ltd & Ors v A-G (No 2) [1995] 2 SLR 733

Esso Petroleum Malaysia Inc v Kago Petroleum [1995] 1 MLJ 149

Keet Gerald Francis Noel John v Mohd Noor @ Harun b Abdullah & Ors [1995] 2 AMR 1859
Renard Constructions (ME) Pty Ltd v Minister for Public Works 33 Con LR 72
Saminathan v Pappa [1981] 1 MLJ 121
Wood Hall Ltd v Pipeline Authority (1979) 141 CLR 443

Legislation referred to

Contracts Act 1950 s 86
Evidence Act 1950 ss 106, 114(g)
Rules of the High Court 1980 O 41 r 5
Sale of Goods Act [UK]

Vinayak Pradhan and *Belden Premaraj* (*Skrine & Co*) for the plaintiff.
Cecil Abraham, Wilfred Abraham and *Rodney Gomez* (*Shearn Delamore & Co*) for the second, third and fourth defendants.

Richard Talalla J: On 30 November 1992, the plaintiff entered into a contract with the second (JGC (Malaysia) Sdn Bhd), third (Kellog (Malaysia) Sdn Bhd) and fourth (Sime Engineering Sdn Bhd) defendants ('the defendants'), whereunder the plaintiff was to carry out certain insulation and painting works as subcontractor to the defendants in respect of the defendants' contract ('the main contract') with Malaysia Liquified Natural Gas Sdn Bhd ('the main contractor'), for the MLNG 2 project at Bintulu, Sarawak. The contract first referred to was formalized in a document dated 4 April 1994 ('the contract').

Pursuant to the contract, the plaintiff had to provide a performance bond. Eventually, two performance bonds were provided by the plaintiff both dated 9 March 1993 and issued by the first defendants ('the bank'), in the form of two guarantees dated 9 March 1993 ('the March guarantees') the terms whereof are identical save for the amounts which are RM1,691,151.60 and RM4,618,547. The March guarantees were issued pursuant to art 9.3 of the contract. Upon the provision of the March guarantees, a downpayment RM6,309,698.50 was made by the defendants to the plaintiff pursuant to the provisions of the contract.

The plaintiff claims that although the downpayment was made after provisions of the March guarantees, the March guarantees do not secure the repayment of the downpayment. The downpayment was to be recovered pursuant to the provisions of the contract as work progressed. The plaintiff claims that there is a recovery schedule for payment and this recovery schedule was subject to two revisions. Of the sum of the downpayment, a sum of RM1.4m was recovered by the defendants but this was subsequently returned to the plaintiff in 1993.

During the course of the plaintiff's work, the plaintiff had made claims for payment for material delivered to site. The defendants did not agree to make these payments, but instead an arrangement was arrived at

pursuant to which the defendants made payment of RM5m, being RM1m on 5 April 1994, RM0.5m on 6 May 1994 and RM3.5m on 28 May 1994, described as an advance and secured by the provision by the plaintiff of an advance payment bond which at the request of the plaintiff was provided by the bank in the form of a guarantee ('the advance payment guarantee') dated 26 May 1994. Of the RM5m advance, the defendants recovered RM1.22m but subsequently made payment of this sum to the plaintiff again.

By a supplementary agreement dated 22 September 1994, the defendants made an advance of RM8m to the plaintiff, which the defendants claim to have been secured by all raw materials and stock held by the plaintiff in the plaintiff's warehouse which was away from the site, the contract having provided for materials to be delivered on site to be paid for by the defendants.

By a second supplementary agreement dated 21 December 1994, the defendants made a further payment of RM10m in terms set out in the second supplementary agreement.

The plaintiff continued to carry out the works under the contract. On 14 April 1995, the defendants terminated the contract by recourse to art 20 of the contract, which article provides that in addition to the contractor's rights set forth in art 19, the contractor has the right at any time, for any reason and at its absolute discretion including during any period when the contract is subject to force majeure as outlined in art 21, to terminate the contract for convenience by notice in writing to plaintiff.

It may be mentioned incidentally that the contract by reference to art 19 provided for termination of the contract in circumstances of the plaintiff's default. The defendants did not have recourse to art 19. In fact, the defendants had commended and complimented the plaintiff on the quality and speed of the plaintiff's work. There was not at any time any allegation by the defendants of default by the plaintiff in the performance of its work.

After the termination of the contract, the defendants by a letter dated 17 April 1995 required the plaintiff to pay the plaintiff's creditors under what the defendants called the lower tier subcontracts, which were contracts the plaintiff had entered into with various persons for supply of materials, labour and other services in connection with its work under the contract, failing which the defendants stated that the defendants would have no option but to call on the bank guarantees provided in connection with the contract.

The plaintiff claims that the defendants are not entitled so to claim for a number of reasons. First, the plaintiff claims that it had, until termination, performed its work satisfactorily and under such conditions as not to entitle the defendants to terminate the contract under art 19 and therefore, and indeed in any event, the defendants are not entitled to call on the March guarantees. Secondly, assuming the defendants are entitled to make a claim on the March guarantees, terms of the contract had been

varied, and the effect has been to change the March guarantees for transactions subsequent to the variance of the contract, the variance being the revision of the recovery schedules ('the payment schedules') and the two supplementary agreements. As to the advance payment guarantee, the plaintiff claims that the second supplementary agreement provides for a retardation of recovery, and the plaintiff's submission is that recovery must await a final determination of the plaintiff's claims through arbitration, it being provided in art 27.2 that any dispute or differences arising out of or in connection with the plaintiff or the implementation of any of the provisions of the plaintiff (whatever that may mean) which cannot be settled amicably shall be submitted to arbitration. Thirdly, the plaintiff claims that assuming the defendants are entitled to claim under the advance payment guarantee, the sum of RM5m has been reduced by RM1.22m to RM3.78m. The plaintiff further argues that the advance payment guarantee on its term provides for recovery of advance payments made under the contract, but the sum of RM5m was not a payment made under the contract but was made as a result of an independent arrangement between the parties.

The plaintiff claims that it has not only met all its obligations to the defendants up to termination, but it is also entitled to payment from the defendants under the terms of the contract. The defendants claim otherwise and say that they have made substantial overpayments. Both parties say that that is a matter for the arbitrator.

Here, it is a question as to whether the defendants are entitled to make claims under the March guarantees and the advance payment guarantee, all three of which I shall refer to as 'the bank guarantees'.

It is trite that here the court is not concerned with a final determination of the claims of the parties, not only in respect of their monetary claims one against the other, but also in respect of the defendants' claim under the guarantees. The plaintiff says claims under the bank guarantees should be determined at a trial.

The plaintiff is seeking an interlocutory injunction until trial, restraining the defendants from accepting any money from the bank under the bank guarantees.

The bank guarantees remain on foot. By consent, a demand was made so as not to deprive the defendants of the obligation to make a demand within the time stipulated in the bank guarantees.

Mr V Pradhan, senior counsel for the plaintiff, submitted that if payment is made under the performance bond it will be recognition that the plaintiff's performance under the contract was not satisfactory, that the demand is not proper, that it is not made in regard to the performance of obligations under the contract but to pay creditors, and that the defendants do not have such a right.

Counsel added that the defendants have paid some of the creditors to the extent of about RM8.7m leaving about RM3.5 outstanding. I then asked whether the creditors had gone knocking at the defendants' door to

which counsel answered, yes, they had, but that was a matter between the plaintiff and the creditors, that the plaintiff's case is that it has not been paid by the defendants, and if the defendants had done so, the plaintiff could have paid its creditors.

I then asked why, in view of the commendations and compliments, the contract was terminated. Counsel for the plaintiff replied that he did not know how to answer that.

The plaintiff's managing director says that the scope of work described in the contract resulted in an estimated price of approximately RM63m. This estimated price was arrived at on the basis of items of work described in the contract against which a rate was fixed. This was a contract where all the drawings were not available prior to commencement of work and details of the work to be done came through isometric drawings. The scope of the work as contained in the drawings was far greater than the work originally contemplated in the contract. So, the plaintiff made claims for additional payment as a result of the vastly increased scope of work. The supplementary agreements provided for an assessment of these claims, namely, that the claims shall be reviewed in good faith between the defendants and the plaintiff who shall provide to the defendants all working papers and supporting data required by the defendants and that the claims shall be settled in accordance with the terms of the contract and in a reasonable manner.

At that time, namely 21 December 1994, the claim submitted by the plaintiff was in the region of RM29.3m. The defendants were only prepared to pay RM1.5m as against the claim of RM29.3m. Further negotiations were held and the plaintiff proposed that they would complete the contract on a lump sum basis, various sums being suggested with a final suggestion of RM118.3m. The suggestion was rejected on 13 April 1995 on which day termination was effected.

Apart from these claims for additional work, the defendants handed to the plaintiff a portion of the site later than contemplated by the contract which necessitated accelerated work to meet the time, and the plaintiff has claimed for this accelerated work. These claims are being reformulated now for the arbitration, and senior counsel for the plaintiff says that he is instructed that at the moment there are claims under 42 heads amounting to a figure in excess of RM50m. Further, the plaintiff points out that immediately after the termination of the contract, a new contractor, Meisei Corporation of Japan, was already on site to take over the plaintiff's work, and the plaintiff now has reason to believe that Meisei were approached in December 1994 by the defendants with a view to taking over the plaintiff's work. The plaintiff points out that the services provided by the plaintiff were specialized work and there are only six contractors in the world who take on this kind of work on this large scale. Apart from the plaintiff, there are two Japanese contractors, two German and one English. Senior counsel said that he was informed that the second defendants are a company whose parent company is Japanese and that the third defendants' parent is

a United States company in which JGC is a shareholder. So, from the defendants' point of view, so counsel said he was instructed, the defendants from sometime in December 1994 appear to have intended that a Japanese company should take over this job. The plaintiff does not know what the price of the contract with Meisei is. I then told counsel for the plaintiff that all this will have to be in an affidavit. He said yes, but having sought confirmation of the facts which he had raised before the court from the plaintiff's managing director who was then present, counsel was to say that the managing director was uncertain as to whether JGC of Japan, the parent company of the second defendants, has a share in Kellog in the USA, the parent company of the third defendants.

I then asked whether it was relevant for the court to be informed whether the employment of the plaintiff by the defendants was a requirement or a condition or was consequent upon a condition of the contract between the main contractors and the defendants. Senior counsel for the defendants, Mr Cecil Abraham, then assisted by saying that he had the main contract and undertook to inform me accordingly, and he then said that the defendants would be replying to all that had been said from the Bar by his learned opponent when it was reduced into an affidavit (that was subsequently done), but in the meanwhile he submitted it was all irrelevant. He said that the affidavits in support of the application make no reference to fraud.

Having said that, he then submitted that the bank guarantees are on demand guarantees and accordingly, the first question the court should be concerned with is a demand on bank guarantees; that the second question is whether as a matter of law, there is a necessity to refer to the underlying contract in this case, and by the underlying contract he meant the contract of 4 April 1994 and the two supplementary agreements; that the third question is (having addressed the above two questions) whether an injunction should be granted to restrain the demand being made or the receipt of the moneys, as the case may be; that a fourth subsidiary question arises, namely, is there fault or innocence on the part of the plaintiff and whether there is a conflict of evidence as to the breach of any of the contracts; that the fifth question is the balance of convenience; and sixthly whether the plaintiff's undertaking as to damages is worth the paper it is written on; and the seventh question is has the plaintiff proved fraud and unlawfulness to our standard which is proof beyond reasonable doubt, and also if the fraud has been brought to the attention of the bank. Counsel also submitted that miscellaneous issues are s 86 of the Contracts Act 1950, the termination under cl 20, and the position of the creditors of the plaintiff and the payment to them by the defendants, and that this list of issues is not exhaustive but are the main issues. He referred to *Esso Petroleum Malaysia Inc v Kago Petroleum* [1995] 1 MLJ 149 and submitted that it is not open to this court to look into any breach of any obligation under the underlying contract.

Senior counsel for the defendants submitted that the plaintiff had a choice as to whether it wanted to contract or not with the clause for termination by reason of convenience, that the plaintiff took a commmercial risk, that in providing the March guarantees and the advance payment guarantee it took the risk that they were on demand documents, that now it is not open to the plaintiff to say it does not like the termination under cl 20, that the main contract provides in cl 20 for discontinuance and the defendants too can be on the receiving end, that the plaintiff went into the contract with its eyes wide opened, that there is nothing unlawful or illegal, that there is no allegation of the defendants doing anything which can be considered unconscionable, and that in any event the only point open is fraud.

I then asked senior counsel for the defendants why should payment now to the plaintiff's creditors concern the defendants, to which he answered that as far as materials are concerned the plaintiff has to warrant good title to all materials delivered to site pursuant to art 24(2), that there is a possibility of title being challenged resulting in litigation and that will interfere with the contract, that there is an indemnity provision (art 14.1), that at that point of time there was a serious cash flow problem which, he said, is not denied, that there was no question of pressure, that the defendants are not a charitable organisation and they were not going to fork out RM8m for convenience. He went on to say that unlike the case of *Wood Hall Ltd v Pipeline Authority* (1979) 141 CLR 443, the defendants did not act surreptitiously, and that a list of creditors was given to them by the plaintiff.

As to balance of convenience, counsel referred to the *Esso Petroleum* case and said that the defendants are in a position to pay, being in no different a position as *Esso* (this was conceded by the plaintiff's counsel earlier), and that the Australian parent company of the plaintiff too is in a loss situation.

Damage if any that may be suffered by the plaintiff is quantifiable, namely, money in performance bonds and interest, argued counsel, and to the question as to whether there is a serious question to be tried, he reiterated that the court should not look at the underlying contract, and that even if the court did so, the balance of convenience favours the defendants.

Junior counsel for the defendants then took up the argument. He submitted that certain issues of fact need to be clarified, that there is a price fixed in the contract, that art 4.00 provides for progress payments, art 4.2 particularly, that the downpayment is a contractual term and is not connected with the performance bond, that the return of the downpayment was at the request of the plaintiff, the defendants say because of the plaintiff's cash flow problems, that the advance payments were not part of the contract, that at termination RM11m was outstanding in the form of

downpayments and refunds, that there was a letter dated 23 March 1995 from the plaintiff to a representative of the third defendants proposing an increase to the contract price from a base figure of RM63m to RM130m, that this offer was rejected in a letter dated 30 March 1995, that this was followed by a second proposal from the plaintiff by letter dated 4 April 1995 where the plaintiff states that the plaintiff claimed an increased scope of work but the defendants say that has nothing to do with the issue in this case, that in any event para 2 of the last referred to letter does not show any increase in scope of work. My finding for the purpose of this application is that the contract may have initially been for work to be done for a fixed price, but that subsequently it was acknowledged and agreed that it was unworkable at that price.

At that stage, I addressed counsel on both sides and asked whether all the relevant facts were before the court, and in particular the facts relative to termination of the contract and the new contract with Meisei and whether, in view of the allegation of unconscionable conduct on the part of the defendants, the defendants should not give to the court the full facts relating to their contract with Meisei. The reply of senior counsel for the defendants was that there is no allegation of unconscionable conduct and that it is not pleaded, neither is there any allegation of concealment nor is concealment pleaded, nor is there any allegation of bad faith and bad faith is not pleaded. Senior counsel for plaintiff interjected saying that there are allegations in the affidavits which raise the question of fraud and unconscionable conduct. Then followed this exchange:

C Abraham: I have taken instructions as to whether the Meisei contract should be produced as per your Lordship's direction.

Judge: There is no direction.

C Abraham: I am instructed that the defendants do not wish to produce the contract as it is irrelevant. As to whether the viability of this contract was workable, (counsel refer to a particular affidavit filed on behalf of the defendants) in effect the plaintiff was saying give us an increase otherwise we cannot and will not perform. As a result the defendants took steps to terminate and they terminated persuant to the terms of the contract — for convenience as was their right.

V Pradhan: It will be significant to note the rates and quantities which have been shown in the Meisei contract so that it can be compared with the quantities and rates in this contract. This will be some evidence in relation to the plaintiff's allegation that the scope of work has changed in the course of the contract, that the first proposed figure was RM130m and the second proposed figure RM118m, that it is to be noted that these proposals were written without prejudice and have been rejected so one cannot draw definitive conclusions against the plaintiffs on any of the matters therein contained, in particular the request to pay creditors which was part of the proposal which did not materialize and these proposals were rejected

before termination of the contract, that the plaintiff agreed that the creditors be paid, that the plaintiff did not request after termination that the creditors be paid, that it was the defendants who wished to pay the creditors, that at the hearing the previous day the court was told that one of the reasons was that art 24 of the contract made provision for assurances of title to and property in materials provided by the creditors to pass to the defendants once they were delivered to the work site, that ordinarily under the Sale of Goods Act property and risk passes on delivery, the exception being reservation of title in the seller before payment in full.

Then followed this exchange:

Judge: Is there before me evidence of claim by creditors to the title to goods on site?

V Pradhan: No.

Judge: Is there any evidence of these creditors still servicing in respect of this project?

V Pradhan: There is no evidence.

Judge: Is there any reason why the defendants should want to see the creditors paid?

V Pradhan: It is possible that the defendants may want the creditors to continue to supply materials and services in respect of the project through the new contractor.

Judge: But there is no evidence of this.

V Pradhan: No evidence either way and it would be a matter within the defendants' knowledge.

Judge: What is the position in an application of this nature in regard to full disclosure?

V Pradhan: No specific provision. It is only when the application is ex parte.

Judge: So here can I draw inferences by reason of there being no evidence present before the court, relevant evidence of course?

V Pradhan: I do not think my Lord can draw any inferences.

Judge: Then is it relevant for me to ask why the defendants wanted to pay the creditors or should I not ask that question?

V Pradhan: Yes, but the plaintiff says it is not material to the plaintiff's case which payment to the creditors is not predicated on a demand made under the guarantee.

Judge: I still do not know why the defendants should want to pay the creditors. Neither party has told me. The defendants are in a position to tell me but they have not done so till now except in regard to the point on title and the plaintiff has nothing to suggest by way of inference.

V Pradhan: There is no evidence but there is a possibility that the defendants could have wanted the creditors to carry on serving the project.

C Abraham: As to creditors — art 24 and the indemnity art 14. We have an ongoing contract with PNB for completion of the contract and we do not want a disruption of that work — emphasize art 20.1 of the PNB & Consortium Contract and 20.7.

Finally, junior counsel for the defendants said that there is no reference in the main contract for employment of locally incorporated subcontractors but that he was instructed that it has been the practice to employ subcontractors who are locally incorporated.

The defendants, in opposing the application, relied strongly on the decision of Karthigesu JA which was delivered on 23 May 1995 in the Court of Appeal of the Republic of Singapore in Civil Appeal No 168 of 1994, *Bocotra Construction Pte Ltd & Ors v AG (No 2)* [1995] 2 SLR 733 where his Honour made, inter alia, the following rulings (at p 738):

> In *IE Contractors Ltd v Lloyd's Bank plc* [1990] 2 Lloyd's Rep 396, Staughton LJ opined that in cases of ambiguity there was 'a bias or (rebuttable) presumption in favour of the construction which holds a performance bond to be conditioned upon documents rather than facts' (at p 500). In the case of unconditional bonds, this would simply require the making of a written demand rather than proof of the facts, for example, of default or failure to perform. Ultimately, this raises a question of construction, and of examining the intent of the document. This approach is clearly borne out in numerous cases, including the two cited above. A recent authority for this proposition emanating from a source closer to home is that of the Malaysian Supreme Court in *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149. Peh Swee Chin SCJ, delivering the court's judgment, opined that the real issue was one of contractual interpretation of the performance bond and not of the nature of the transaction. We consider this to be the correct approach to adopt.

At p 746:

> In our opinion, whether there is fraud or unconscionability is the sole consideration in applications for injunctions restraining payment or calls on bonds to be granted. Once this can be established, there is no necessity to expend energies in addressing the superflous question of 'balance of convenience'. It does not lie in the mouth of the defendants to claim that damages would still somehow be adequate remedy.

The *Esso Petroleum* case, being a decision of the Federal Court, binds me. I therefore need to examine that decision for its effect. I see it as being dichotomous, envisaging on the one hand, a situation between the issuer of a pure on-demand performance bond on the one part and the beneficiary of the bond on the other part where the issuer should unquestionably pay the beneficiary on demand except in the case of fraud, and on the other hand, a situation between a person on whose order such a bond is issued on the one part and the beneficiary on the other part where upon that person making an application for an interlocutory injunction restraining the beneficiary from receiving any money under the bond the principle in the *American Cynamid* case is to apply, which said principle includes a

consideration of any special factors as referred to by Lord Diplock in that case, and that a pure on-demand guarantee constitutes such a factor which operates against the applicant. It has to be remembered that Lord Diplock, in reference to the factors in that case, reiterated that in addition to those there may be many other special factors to be taken into consideration in the particular circumstances of an individual case. (See *American Cynamid Co v Ethicon Ltd* [1975] 1 All ER 504 at p 511.)

Counsel for the plaintiff cited the case of *Renard Constructions (ME) Pty Ltd v Minister for Public Works* 33 Con LR at pp 72 and 73. In that case the appellant ('Renard') entered into a contract with the respondent ('the minister') in 1985 for the construction of pumping stations under a form of contract known as NPEC Edition 3. The contract was a schedule of rates contract with an estimated final value of $208,950. Practical completion was fixed for 17 January 1986, and liquidated damages was fixed at $1,000 a week. Extensions of time were applied for and partly granted, extending practical completion to 3 March 1986. On 28 February 1986, Renard applied for a further extension of time. On 4 March 1986, the minister gave notice under cl 44.1 of the contract calling on Renard to show cause before 18 March 1986 why the minister should not take over the work and cancel the contract. On 17 March 1986, the contractor, in showing cause, stated inter alia, that the minister had not supplied materials which under the contract it was required to supply. On 26 March 1986, Renard was instructed to continue work. By a letter dated 2 April, the minister granted an extension of time taking the date for practical completion to 7 March 1986. At this date, the minister had not yet supplied all the materials which he was required to supply under the contract. On 20 May 1986, a further notice to show cause why the minister should not take over the contract or cancel it was served on Renard, calling for a reply before 5pm on 26 May 1986. On 26 May 1986, Renard delivered a letter stating that they were willing and able to complete the contract within a reasonable time. On 27 May 1986, a Mr Hall, the minister's assistant project manager told Mr Bagust, the superintendent appointed under the contract, of some matters concerned with the contract but did not give him a complete picture of the extent of the work which had been done in the days after the service of the notice to show cause. Mr Hall recommended cancellation of the contract and Mr Bagust made such a recommendation to Mr Connor, the official with appropriate delegated authority from the minister to terminate contracts. In reaching his decision, Mr Connor was not aware of the relevance of the delays in supplying materials nor of the fact that since the service of the notice to show cause Renard had increased its work force and brought in a new highly experienced foreman. Mr Connor signed notices dated 29 May 1986 taking over the contracts and excluding Renard from the site. Renard treated the notice as a wrongful repudiation of the contract, accepted the repudiation, and left the site. Renard then began arbitration proceedings under cl 45 of the contract. The arbitrator held that the minister was unreasonable in exercising its power to take over the

contract and exclude the contractor from the site, and that the minister's action amounted to a repudiation of the contract. The arbitrator held that the contractor was entitled to recover on a quantum meruit basis. The minister appealed. Cole J held that the minister was not under a duty to behave reasonably in exercising its power under the contract. It was sufficient that the minister gave bona fide, proper and due consideration to any representations made by the contractor in answer to a show cause notice. Renard appealed. The New South Wales Court of Appeal held that the minister was under a duty to act reasonably in deciding to exclude the contractor from the site because it was necessary in order to give business efficacy to the contract to imply such an obligation since a sensible contractor would not enter into a contract under which the show cause procedure could be exercised unreasonably, that contracts generally were subject to an implied obligation that they should be performed in good faith, that the great width of the power given to the minister by cl 44.1 to vary or cancel the contract required some restraint on their exercise and that the show cause procedure was inconsistent with the notion that the minister was entitled to act, within the limits of honesty, on his own idiosyncratic opinion.

Even an interlocutory application such as this has to be decided on its own facts. The main contract had in it an article similar to art 20. The principal in the main contract was effectively the government of Malaysia who with the main contrator, who on its own admission is one of the largest multinational companies in the world, would have had access to and been advised by persons possessed of the best legal minds in the common law world who certainly would have had in mind concepts of good faith, reasonableness and fair play when drafting and settling the article in question. Likewise art 20 in the contract in this case. Ordinarily, it is not the function of the court to be making contracts or filling the gaps for parties thereto; especially so in this case bearing in mind the circumstances under which the main contract and the contract came about. Article 20, like its parent in the main contract, emerges in terms especially clear leaving no doubt as to its meaning. I envisage the defendants in relation to the main contract before putting pen to paper with the best legal advice available to them having carefully considered the possibility of the contract being terminated in bad faith and unreasonably by the principal, weighed it against the improbability of that happening by reason of the principal being effectively the Malaysian government, who implicitly would not act in bad faith or unreasonably and thereafter taken a final step by bringing the pen down on the document. As between the plaintiff and the defendants, I envisage the precontractual scene in so far as it is relevant to these proceedings unfolding with the plaintiff's concern upon being confronted with the proposed art 20 whereupon it too would have obtained the same advice, adopted the same reasoning vis-à-vis itself and the defendants, who it was agreed constituted one of the largest multinationals in the world, who had to be taken to be incapable of acting in bad faith or unreasonably, and then put pen to paper.

As I see it, there was no question of default, refusal or neglect on the part of the plaintiff to the end that the provisions of art 19 came into play. The defendants did not have recourse to the provisions of art 19. There was no suggestion from the defendants that the plaintiff was in default or had refused or neglected as abovestated. The plaintiff must therefore be taken to be in no way in breach of the contract. It was with the plaintiff taken to be such that the defendants exercising their power under the provisions of art 20 prematurely terminated the contract. That being the case, the event of final completion of the contract by the plaintiff was, by act of the defendants, not to take place. Inasmuch as such final completion was not to take place it had to follow that there could be no certificate of final completion. Pursuant to the provision of art 9.3, the bank guarantee was to remain in force and effect until 60 days after the date stated in the certificate of final completion, or until receipt of bank guarantee referred to in art 9.4, whichever is the later. There was never any question of a bank guarantee referred to in art 9.4 coming into existence. In the premises, it would seem that upon the act of the defendants rendering final completion impossible, the bank guarantee ceased to have force and effect.

If the foregoing deduction is wrong and the bank guarantee is to be taken as having force and effect, then, there will need to be examined the rights of the defendants and the liabilities of the plaintiff arising from the defendants having exercised their rights under art 20. Such an examination discloses a number of obligations, none of which embrace the right of the defendants to make demand under the bank guarantees or the liability of the defendants to submit to such demand and payment under the bank guarantees without objection.

At any rate, such rights do not include, nor has it been brought to my notice that there is anywhere in the contract a right in the defendants to demand of the plaintiff that the plaintiff pay its debts to the lower tier subcontractors, and/or in the event of the plaintiff failing to do so the defendants would be at liberty to do so, and in the event make demand and receive payment under the bank guarantees.

It was pursuant to the provisions of art 9 that the plaintiff was required to lodge with the defendants the bank guarantee. It was not expressly stated in the contract what the guarantee was for. I could find nothing from the material placed before me to show even in the remotest manner that the guarantee was for, or to include, the due payment by the plaintiff of its debts to the lower tier subcontractors. Yet the defendants demanded that the plaintiff pay its creditors, the lower tier subcontractors, and threatened that if the plaintiff did not do so, the defendants would demand and seek payment under the bank guarantees. Indeed, nothing was placed before me to indicate that the defendants had a lawful or any obligation to pay the lower tier subcontractors the debts owed by the plaintiff. It had to follow that payment by the defendants, or requirement by the defendants of the plaintiff that the plaintiff make payment of the said debts was gratuitous.

So as to enable me to have a proper understanding of the matter at hand, I asked more than once why the defendants were at pains to ensure that the lower tier subcontractors were paid. The defendants seemed somewhat coy about providing an answer. At the end of the addresses by counsel on both sides, I said that I had still not been told. It was only then that the defendants confessed the true reason, all as stated above. So in the end, perplexity focussed into reality.

The real situation as I gather from the material before me and deduce therefrom, is that the plaintiff was carrying out its obligations under the contract to the satisfaction of the defendants who had in the course of the plaintiff's work commended and complimented the plaintiff on its work. There were additional works to be carried out which entailed further cost which the defendants accepted. The plaintiff put up a projected sum which the defendants declined to accept. The plaintiff then put up a revised sum which again the defendants found unacceptable. The defendants then terminated the contract for convenience. The work done by the plaintiff was of a highly specialized nature. Apparently, there were only six persons in the world who were capable of undertaking this sort of work. The defendants had, as a standby, one of those six persons, namely, an entity called Meisei to step in the shoes of the plaintiff should the plaintiff drop out or be dropped from the contract as indeed the latter happened. The plaintiff's managing director affirmed that the largest shareholder in the second defendant's company is a Japanese company called JGC Corporation. He affirmed to a belief that Meisei Corporation has a close association with JGC Corporation and the second defendants' company. He did not state the grounds of his belief as required by O 41 r 5 of the Rules of the High Court 1980. I presume therefore that he had no grounds but only a suspicion that that was the case. On the other hand, whether or not Meisei had such an association with the second defendants should be well within the knowledge of the defendants and especially the second defendants, but none of them was prepared to tell. Instead, they filed an affidavit wherein the deponent affirmed to a belief that the plaintiff's cash flow difficulty was affecting their obligations under the contract which in turn affected the defendants' overall work programme with the main contractor, that they selected Meisei to perform the uncompleted works because they were one of the original tenderers for the contract and as such had knowledge of the works required and that the contention that the defendants had held discussions with Meisei on taking over the works from the plaintiff some months prior to termination was believed (no grounds of belief were provided) to be untrue. A copy of the company search on the second defendants as conducted on 24 April 1995 was then produced and marked as an exhibit to his affidavit and was proof of that Corporationoration being the largest shareholder of the second defendants.

It is stated in s 106 of the Evidence Act 1950 that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. It is provided in s 114 illustration (g) of the same Act that

A the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. It is the contention of the plaintiff that the defendants conveniently terminated the contract and gave it to Meisei with whom the second defendants had a financial connection. The plaintiff contends that having done so, the
B defendants called on the bank guarantees admittedly to pay off the lower tier subcontractors so that they or Meisei could continue to utilize their services so as to enable them with Meisei to complete the main contract to their mutual benefit at the expense of the plaintiff. The plaintiff asked to see the contract which the defendants had entered into with Meisei. The contract would have gone a long way to tell whether or not the defendants
C had secured a deal with Meisei more favourable to the plaintiff's projected figures of RM26m reduced to RM17m for completion of the work. The defendants refused to furnish sight of the Meisei contract or to reveal the contract price payable to Meisei. Here then, the presumption under s 114 arose.

D If the defendants used art 20 as a device to terminate the contract, not for convenience, but to put Meisei into the shoes of the plaintiff so that Meisei could enjoy the benefit of whatever profits remain of the contract especially if one or more of the defendants has an interest in Meisei in the enjoyment of the said benefit, such a use of art 20 is in my mind a fraud on the plaintiff and amounts to the defendants acting in bad faith and in
E an unconscionable manner.

That supposition must be presumed to be true, in view of the defendants' refusal to tell the court whether one or more of the defendants has an interest in Meisei and if so what that interest is and what the consideration of the contract with Meisei is. I mention in passing that the
F defendants gave no reason for such refusal. I do so presume. It has to follow that I must find that the defendants are guilty of fraud, have acted in bad faith and in an unconscionable manner, and I do so find for the purposes of this application. The consequence is that the plaintiff on the authority of both the *Bocotra* case and the *Esso* case is entitled to the order it seeks in the application.

G The defendants argued that a claim of fraud has to be pleaded fully, and proved beyond reasonable doubt under the authority of *Saminathan v Pappa* [1981] 1 MLJ 121, and that here there is neither such plea nor proof and furthermore nowhere in these proceedings has the word fraud appeared. Bearing in mind that this is an interlocutory application being
H heard inter partes for an order for an injunction restraining the defendants from receiving moneys under the bank guarantees, there is no question of pleading or proof as such, but a question of the plaintiff placing sufficient affidavit evidence before the court, so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of fraud or the
I likelihood of a fraud being committed has been established to an extent sufficient for the court to be minded to order the injunction sought. As to whether or not it is a requisite that the word fraud should actually be used,

it hardly calls for reminder that that word denotes an intangible thing which from a dictum or data of experience becomes recognizable as such. It follows that it is not fraud as an abstract thing which requires to be spoken to by way of affirmation, but the data pointing to the same and accordingly mention of the word fraud itself is not necessary.

Applying the law which binds me, namely, the *Esso Petroleum* case and *Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & Ors* [1995] 2 AMR 1859, I make the following findings:

(1) There are questions for trial. There is nothing frivolous or vexatious about those questions. The questions are serious. They include:

(a) whether the defendants in terminating the contract for conveniece under art 20 are bound to have acted reasonably and in good faith or at least in good faith, and if so, whether or not they did so act;

(b) whether the defendants in the light of their refusal to tell the court what their arrangement was with Meisei used art 20 as a device to commit a fraud on the plaintiff by taking away the contract from the plaintiff and giving it to Meisei in whom the defendants or one or or more of them may have a beneficial interest, especially if it turns out that the plaintiff did all the spade work under the contract;

(c) whether the defendants who made no reference to any rights under the terms of the contract, but on the contrary were at pains to convince me not to consider the terms, relying on the *Bocotra* principle, have a right to require the plaintiff to pay the lower tier subcontractors to the admitted benefit of the defendants and Meisei;

(d) whether in the absence of such a right the defendants' intimation that they will call on the guarantees in the event of the plaintiff failing to pay the creditors is dishonest or at least reprehensible behaviour disentitling them to any relief from this court;

(e) whether in view of the compliments and commendations by the defendants in respect of the plaintiff's work under the contract, the absence of any real complaint about the plaintiff's performance and the suddenness of the termination of the same, the plaintiff is innocent of default, refusal or neglect in its performance of the contract;

(f) whether upon exercise by the defendants of their right to terminate the contract for convenience the defendants forego the right to claim default, refusal or neglect by reference to the art 19;

(g) whether upon termination of the contract under art 20(i) the bank guarantees cease to have force and effect by reference to

art 9.3, its life span being contracted till a date which by act of the defendants becomes incapable of occurring or ascertaining.

(2) The plaintiff has already suffered harm from having the work taken away from it. The guarantees remain on foot, and as long as they do so I see no harm done to the defendants apart from their not being able to lay their hands on the money payment of which has been guaranteed. On the other hand, there is a world of difference to the plaintiff between such money being paid out to the defendants thus requiring the plaintiff to reimburse the bank, and keeping the bank guarantees alive which entails ensuring that the security for the guarantees remains intact and payment of the bank's charges. I do not consider as valid an argument that damages will be an adequate remedy to the plaintiff, because if the defendants are allowed to call on the bank guarantees and the bank makes payment, the plaintiff may not be able to reimburse the bank, mainly by reason of the plaintiff, at the hands of the defendants, having been deprived of the profits it would have earned had the contract not been terminated. That will expose the plaintiff to being wound up, which could lead to its liquidator not pursuing its claim against the defendants, and that could well be the goal the defendants are aiming for. The balance of convenience certainly favours the plaintiff.

The foregoing, to my mind, constitute special factors upon which an injunction should be granted.

To my mind, justice demands that the status quo remains, but I am prepared to hear submissions as to whether the undertaking as to damages needs to be fortified.

Accordingly I order:

(1) that the order made herein on 6 May 1995 be extended until final determination of this action;

(2) that the costs of the application be in the cause;

(3) that the plaintiff's undertaking as to damages be fortified, the term of fortification to be agreed by the parties failing which by the court upon appointment.

Order accordingly.

Reported by Angela Ho